

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of: Vivian A. Schramm et al. § Group Art Unit: 1761
Serial No.: 09/707,156 § Examiner: Steven L. Weinstein
Filed: November 06, 2000 § Docket: MRS-015U
For: Spill-Proof Candy Container § Conf No.: 8663

APPEAL BRIEF

Commissioner of Patents
Alexandria, VA 22313-1450

This correspondence is being
electronically transmitted to the
patent office via an EFS-Web
transmission on Sept 22, 2010.

Dear Sir:

Pursuant to 37 CFR § 41.37, appellants submit this Appeal Brief to the Board of Patent Appeals and Interferences in support of their appeal from the decision dated April 22, 2010 of the examiner rejecting claims 1-14 and 21-26 of the captioned application and in response to the official office action dated April 22, 2010. Appellants submit herewith the requisite fee for the filing of a brief in support of an appeal pursuant to 37 CFR § 41.20(b)(2) via the EFS-Web transmission. The appellants submit that the Examiner erred in rejecting the claims, and respectfully request reversal of the rejection.

(c)(1)(i) Real Party in Interest

The real party in interest is Vivian A. Schramm and Michael R. Schramm.

(c)(1)(ii) Related Appeals and Interferences

Appellants are unaware of any pending appeal or interference which affects this appeal.

(c)(1)(iii) Status of Claims

Claims 1-14 and 21-26 are rejected and are pending and on appeal.

(c)(1)(iv) Status of Amendments

The appealed claims have been finally rejected. No amendments have been filed subsequent to the latest final rejection.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 1

The subject matter of claim 1 is “A substantially spherically shaped container having an inner cavity of a predetermined volume and an open funnel of a predetermined volume extending into the inner cavity, and wherein the container removably contains at least one of an edible particulate candy substance, a candy article substance, and a combination of an edible particulate candy substance and a candy article substance, and wherein the candy article substance includes a handle portion connected thereto, and wherein the volume within the container occupied by the edible particulate candy substance defines a volume that is no more than one half of the result of the container volume minus the funnel volume” as described in the specification on page 6, first paragraph through page 7, fourth paragraph, page 12, first paragraph, and the drawings figures 1 through 3.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 8

The subject matter of claim 8 is “A substantially spherically shaped container having an inner cavity of a predetermined volume and an open opening in a wall of the container, wherein the container inhibits the spillage of free flowing particulate matter when the container contains free flowing particulate matter and is oriented in any position and wherein the container contains at least one an edible particulate candy substance, a candy article substance, and a combination of an edible particulate candy substance and a candy article substance, and wherein the candy article further includes a handle connected thereto, and wherein the handle includes a pliable plug connected to the

handle, the pliable plug is adapted to sealingly close the container when the plug is inserted into the opening of the wall, and wherein a volume within the container occupied by the edible particulate candy substance defines a volume that is no more than one half of the container volume” as described in the specification on page 6, first paragraph through page 7, fourth paragraph, page 12, first paragraph, and the drawings figures 1 through 3.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 21

The subject matter of claim 21 is “A substantially hollow spherically shaped container having an inner cavity of a predetermined volume and a substantially cylindrically shaped open funnel of a predetermined volume extending into the inner cavity, the funnel having a first open end and a second open end, the second open end being positioned within the inner cavity, wherein the container contains an edible particulate candy substance and wherein the container removably contains a substantially spherical candy article, the candy article has a substantially elongated cylindrical handle connected to the candy article on a first end of the handle, the handle is connected to a pliable plug on a second end of the handle, the plug is adapted to sealingly close the container when the plug is inserted into the funnel first open end, and wherein a volume within the container occupied by the edible particulate candy substance defines a volume that is no more than one half of the resultant volume of the container volume minus the funnel volume, and wherein the funnel second open end and the candy article are adapted such that when the candy article is inserted within the container inner cavity a substantial gap is formed between the funnel second open end and the candy article, and wherein the diameter of the candy article substantially exceeds the diameter of the handle such that when the container is repositioned from a first position to a second position the gap and the difference in the size of the diameters of the candy article and the handle cooperate so as to provide for the flow of the edible particulate candy substance through the gap and around substantially the entire exterior of the candy article so as to enable the coating of substantially the entire exterior of the candy article with the edible particulate candy substance” as described in the specification on page 6, first paragraph through page 7, fourth paragraph, page 12, first paragraph, and the drawings figures 1 through 3.

(c)(1)(vi) Grounds of Rejection to be Reviewed on Appeal

Ground 1: Claims 1-14 and 21-26 are rejected under 35 USC § 112 first paragraph for containing new matter and being based on a non-enabling disclosure.

Ground 2: Claims 1-14 and 21-26 are rejected under 35 USC § 103(a) as being unpatentable over the Product Alert (3/23/98) reference as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A, B, D, F, and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870) and appellants' admission of the prior art, in view of Price (3,840,678), as further evidenced by Hunter (GB '356), Williams ('174), Ciffo (2,917,766), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al (GB '581), .McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (Fr '917), Pilot Ink (JP '388), and McCaffery ('164), and further in view of Vogelsang (4,522,523) and Manzone (4,522,523).

Ground 3: Claims 1-14 and 21-26 are rejected under 35 USC § 103(a) as being unpatentable over Price (3,840,678), as further evidenced by Hunter (GB '356), Williams ('174), Ciffo (2,917,766), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al (GB '581), .McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (Fr '917), Pilot Ink (JP '388), and McCaffery ('164), in view of Product Alert (3/23/98), as further evidenced by as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A, B, D, F, and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870) and appellants' admission of the prior art, and further in view of Vogelsang (4,522,523) and Manzone (4,522,523).

(c)(1)(vii) Argument 1, Claims 1-14 and 21-26 were erroneously rejected under 35 USC § 112 first paragraph – New Matter:

The examiner rejected claims 1-14 and 21-26 under 35 USC § 112 2nd paragraph as being based on a non-enabling disclosure due to the presence of new matter. More specifically, the examiner urges that, "*the various length/volume recitations ... are new matter, not necessarily and inherently supported by the specification as originally filed*". The examiner further states that, "*Claim 21 now recites that a "substantial" gap (not otherwise defined/disclosed) is formed between the funnel second open end and the candy article such that "when the container is repositioned from a first position to a second position" (not) cooperate so as to provide for the flow of the particulate candy substance through the gap so as to enable the coating of substantially the entire exterior of the candy article with the particulate substance. Not only is there no necessary and inherent support for the phrases in question, ...*". Appellants traversed the examiner's rejection and represent that none of claims 1-14

and 21-26 contain new matter. Appellants respectfully urge that the examiner's assertions are not supported by the facts of the case and that the honorable board reverse the examiner's rejection.

Regarding the various length/volume recitations, appellants respectfully point out that each and every one of the various length/volume recitations are fully and completely supported by and depicted in appellant's drawings as originally filed and duly accepted. Appellants respectfully point out that such support by the drawings is true regardless of the any particular scale of the drawings. Accordingly, appellants respectfully urge that the various length/volume recitation claim language is inherently supported by the specification and that such claim language is not new matter.

For instance, all of claims 1, 8, and 21 include the volume recitation of "*a volume within said container occupied by said edible particulate candy substance defines a volume that is no more than one half of the result of said container volume minus said funnel volume*". This is inherently required of the invention for the proper functioning of the spill resistivity of the invention. Such volume can be readily ascertained from the specification. In words and drawings, the following was originally disclosed in by the instant application: the container as a substantially hollow spherical container in the relative (to the other parts) size as shown, the funnel as a hollow cylindrical funnel in the relative (to the other parts) size as shown, the stick handle as a cylindrical stick handle in the relative (to the other parts) size as shown, the candy article as a spherical candy article in the relative (to the other parts) size as shown, and the candy powder as flowable candy powder in an amount as shown in the drawings (i.e. an amount occupying less than half of the container in figures 3A, 3B and 3C even with the candy article in the candy powder) and as noted in the abstract as "*filled to no more than a predetermined amount*". Thus, appellants respectfully urge that it does not take any strenuous analysis to see that the instant application, as originally filed and with the drawings at any scale, supports "*a volume within said container occupied by said edible particulate candy substance defines a volume that is no more than one half of the result of said container volume minus said funnel volume*". Appellants respectfully urge that to consider the volume limitation as new matter when it is plainly evident that such support exists in the drawings, is to render invalid and meaningless the duly filed and legitimately accepted drawings.

Further for instance, claim 21 includes the size recitation of “*the diameter of said candy article substantially exceeds the diameter of said handle*”. Such size can be readily ascertained from the drawings without respect to any particular scale. In words and or drawings, the following was originally disclosed in by the instant application: the stick handle as a cylindrical stick handle in the relative (to the other parts) size as shown and the candy article as a spherical candy article in the relative (to the other parts) size as shown. Appellants point out that in each and every figure of the drawings as originally disclosed, the diameter of said candy article is shown as substantially exceeding the diameter of the handle. Thus, appellants respectfully urge that it does not take any strenuous analysis to see that the instant application, as originally filed and at any scale, supports “*the diameter of said candy article substantially exceeds the diameter of said handle*”. Appellants respectfully urge that to consider the dimater limitation as new matter when it is plainly evident that such support exists in the drawings, is to render invalid and meaningless the duly filed and legitimately accepted drawings.

Regarding the “substantial gap” that is formed between the funnel second open end and the candy article, appellants respectfully point out that such substantial gap is depicted in all of drawing figures 1, 3A, 3B, and 3C. Appellants further respectfully point out that the flow of candy powder differs from the flow of low viscosity liquids (such as for instance bubble solution or egg dye), and that as such, the spill-proof candy container as disclosed by appellants required a unique physical design different from all previous containers in order to function as disclosed by appellants. As explained to the examiner in previous office action responses, the substantial gap taught by appellants accommodates the coating of the candy article by the candy powder which does not flow as easily as a low viscosity liquid. Accordingly, appellants respectfully urge that the substantial gap claim language is inherently supported by the specification and that such claim language is not new matter. Appellants respectfully urge that to consider the gap limitation as new matter when it is plainly evident that such support exists in the drawings, is to render invalid and meaningless the duly filed and legitimately accepted drawings.

Regarding the “repositioning from a first position to a second position”, appellants respectfully point out that repositioning was in fact disclosed in the specification as originally filed. Appellants point to page 7, 2nd paragraph which reads, “*In practice, with particulate matter 60 contained within*

container 26, lollipop 40 is wetted, such as by the user placing the lollipop in the user's mouth, and then while holding on to holder/plug 50, lollipop 40 is inserted into container 26 by moving lollipop 40 through funnel 36 openings 37 and 38. Wetted lollipop 40 is then merely brought into contact with particulate matter 60 or with holder/plug connecting flange 54 in sealing engagement with upper container member upper connecting flange 34, container assembly 10 is shaken to cause lollipop candy 42 to become coated with edible particulate matter 60". Appellants respectfully point out that such shaking of the container to coat the candy article with candy powder constitutes the disclosure of a repositioning of the container from a first position to a second position. Accordingly, appellants respectfully urge that the repositioning from a first position to a second position claim language is inherently supported by the specification and that such claim language is not new matter.

(c)(1)(vii) Argument 2, Claims 1-14 and 21-26 were erroneously rejected under 35 USC § 103(a) - Obviousness:

The examiner rejected claims 1-14 and 21-26 under 35 USC § 103(a) as being unpatentable over the Product Alert (3/23/98) reference as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A, B, D, F, and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870) and appellants' admission of the prior art, in view of Price (3,840,678), as further evidenced by Hunter (GB '356), Williams ('174), Ciffo (2,917,766), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al (GB '581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (Fr '917), Pilot Ink (JP '388), and McCaffery ('164), and further in view of Vogelsang (4,522,523) and Manzone (4,522,523). Appellants traversed the examiner's rejection and represents that all of claims 1-14 and 21-26 are nonobvious in light of and define over the cited references. Appellants respectfully point out that none of the cited art, alone or in combination teach all of the elements/limitations of appellant's claims. Accordingly, it is inherently impossible for appellant's claims to be obvious in light of and unpatentable over any singular reference or a combination of references that do not teach all of the limitations of appellant's claims. Inasmuch as all of claims 1-14 and 21-26 define over and are

nonobvious in light of the cited references, appellants respectfully request that the honorable board reverse the examiner's rejection

(c)(1)(vii) Argument 3, Claims 1-14 and 21-26 were erroneously rejected under 35 USC § 103(a) - Obviousness:

The examiner rejected claims 1-14 and 21-26 under 35 USC § 103(a) as being unpatentable over Price (3,840,678), as further evidenced by Hunter (GB '356), Williams ('174), Ciffo (2,917,766), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al (GB '581), .McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (Fr '917), Pilot Ink (JP '388), and McCaffery ('164), in view of Product Alert (3/23/98), as further evidenced by as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A, B, D, F, and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870) and appellants' admission of the prior art, and further in view of Vogelsang (4,522,523) and Manzone (4,522,523). Appellants traversed the examiner's rejection and represents that all of claims 1-14 and 21-26 are nonobvious in light of and define over the cited references. Appellants respectfully point out that none of the cited art, alone or in combination teach all of the elements/limitations of appellant's claims. Accordingly, it is inherently impossible for appellant's claims to be obvious in light of and unpatentable over any singular reference or a combination of references that do not teach all of the limitations of appellant's claims. Inasmuch as all of claims 1-14 and 21-26 define over and are nonobvious in light of the cited references, appellants respectfully request that the honorable board reverse the examiner's rejection

(c)(1)(viii) Claims appendix

The following are the claims involved with this appeal.

1. A container for inhibiting the spillage of contents of said container, wherein said container defines a substantially spherically shaped container having an inner cavity of a predetermined volume and an open funnel of a predetermined volume extending into said inner cavity to provide communication between said inner cavity and the exterior of said container, and wherein said container removably contains at least one substance of the following group of substances comprising an edible particulate candy substance, a candy article substance, and a combination of an edible particulate candy substance and a candy article substance, and wherein said candy article substance further includes a handle portion connected thereto, and wherein a volume within said container occupied by said edible particulate candy substance defines a volume that is no more than one half of the result of said container volume minus said funnel volume.
2. The container of claim 1 wherein said edible particulate candy substance further defines at least one substance of the following group of substances comprising a candy powder substance and a candy bead substance, and wherein said candy article substance further defines a substance of one of the following group of substances comprising a discreet substantially spherical candy substance and a lollipop substance.
3. The container of claim 1 wherein said container inhibits the spillage of said substance when said container is oriented in any position.
4. The container of claim 3 wherein said container includes a lollipop within said container and wherein said lollipop is removable from said container by passing said lollipop through said funnel.
5. The container of claim 2 wherein said lollipop defines a lollipop having a handle and wherein said handle includes a pliable holder mounted to said handle and wherein said holder is sealingly engagable to said container.

6. The container of claim 1 wherein said funnel includes an inner opening and wherein said inner opening is located near the center of said container.
7. The container of claim 1 wherein at least a portion of said container is substantially transparent so as to reveal the contents of said container.
8. A container for inhibiting the spillage of contents of said container, wherein said container defines a substantially spherically shaped container having an inner cavity of a predetermined volume and an open opening in a wall of said container to provide communication between said inner cavity and the exterior of said container and wherein said container inhibits the spillage of free flowing particulate matter when said container contains free flowing particulate matter and is oriented in any position and wherein said container contains at least one substance of the following group of substances comprising an edible particulate candy substance, a candy article substance, and a combination of an edible particulate candy substance and a candy article substance, and wherein said candy article further includes a handle connected thereto, and wherein said handle includes a pliable plug connected to said handle, said pliable plug being adapted to sealingly close said container when said plug is inserted into said opening of said wall, and wherein a volume within said container occupied by said edible particulate candy substance defines a volume that is no more than one half of said container volume.
9. The container of claim 8 wherein said edible particulate candy substance further defines at least one substance of the following group of substances comprising a candy powder substance and a candy bead substance, and wherein said candy article substance further defines a substance of one of the following group of substances comprising a discreet substantially spherical candy substance and a lollipop substance.
10. The container of claim 8 wherein said open opening defines an open funnel.
11. The container of claim 10 wherein said lollipop is removable from said container by passing said lollipop through said funnel.

12. The container of claim 9 wherein said lollipop substance defines a lollipop having a handle and wherein said handle includes a pliable holder mounted to said handle and wherein said holder is sealingly engagable to said container.
13. The container of claim 10 wherein said funnel includes an inner opening and wherein said inner opening is located near the center of said container.
14. The container of claim 8 wherein at least a portion of said container is substantially transparent so as to reveal the contents of said container.
21. A container for inhibiting the spillage of contents of said container, wherein said container defines a substantially hollow substantially spherically shaped container having an inner cavity of a predetermined volume and a substantially cylindrically shaped open funnel of a predetermined volume extending into said inner cavity to provide communication between said inner cavity and the exterior of said container, said funnel having a first open end and a second open end, said second open end being positioned within said inner cavity, and wherein said container contains an edible particulate candy substance and wherein said container removably contains a substantially spherical candy article, said candy article having a substantially elongated cylindrical handle connected to said candy article on a first end of said handle, said handle being connected to a pliable plug on a second end of said handle, said plug being adapted to sealingly close said container when said plug is inserted into said funnel first open end, and wherein a volume within said container occupied by said edible particulate candy substance defines a volume that is no more than one half of the resultant volume of said container volume minus said funnel volume, and wherein said funnel second open end and said candy article are adapted such that when said candy article is inserted within said container inner cavity a substantial gap is formed between said funnel second open end and said candy article, and wherein the diameter of said candy article substantially exceeds the diameter of said handle such that when said container is repositioned from a first position to a second position said gap and said difference in the size of said diameters of said candy article and said handle cooperate so as to provide for the flow of said edible particulate candy substance through said gap and around substantially the entire exterior of said candy

article so as to enable the coating of substantially the entire exterior of said candy article with said edible particulate candy substance.

22. The container of claim 21 wherein said edible particulate candy substance further defines a substance of one of the following group of substances comprising a candy granular substance, a candy powder substance, and a candy bead substance.

23. The container of claim 21 wherein said container inhibits the spillage of said substance when said container is oriented in any position.

24. The container of claim 21 wherein said funnel second open end is located near the center of said container.

25. The container of claim 21 wherein said candy article further defines a lollipop having an edible candy portion and a handle portion, said handle further defining an elongated stick portion and a plug portion, and wherein a resultant length of said stick portion and said plug portion in combination is adjustable.

26. The container of claim 21 wherein container is adapted to resemble at least one of a jack-O-lantern, a cauldron, an egg, and a fingernail polish bottle, and wherein said plug is adapted to resemble at least one of a jack-O-lantern lid, a cat, a witch, a bunny, a chick, and a brush handle, and wherein said plug includes a stepped opening adapted such that a pencil is removably insertable into said plug.

(c)(1)(ix) Evidence appendix

Appellants have no evidence to present.

(c)(1)(x) Related proceedings appendix

Appellants are unaware of any proceedings to present.

Conclusion

In view of the above arguments, it is submitted that the examiner erred in rejecting the claims on appeal. Appellants therefore respectfully request that this honorable board reverse the examiner's rejection of the claims. If the board has any questions or comments which may be resolved over the telephone, the board is requested to call Michael R. Schramm at 801-710-7793.

DATE: September 22, 2010

Respectfully submitted,

Michael R. Schramm

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